

CAUSE NO. \_\_\_\_\_

STEVEN HOTZE, M.D.,	§	IN THE DISTRICT COURT
Hotze Health & Wellness Center,	§	
AL HARTMAN,	§	
Hartman Income REIT,	§	
NORMAN ADAMS,	§	
Adams Insurance,	§	
HON. RICK GREEN,	§	
Former State Representative District 45	§	
Texas House of Representatives,	§	
CATHIE ADAMS,	§	
Former Chairman,	§	_____ JUDICIAL DISTRICT
Republican Party of Texas,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
GOVERNOR GREGG ABBOTT,	§	
in his official Capacity as Governor of	§	
the State of Texas,	§	
	§	
Defendant.	§	TRAVIS COUNTY, TEXAS

**PLAINTIFFS' ORIGINAL PETITION, APPLICATIONS FOR EMERGENCY  
TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND  
PERMANENT INJUNCTION**

COME NOW Plaintiffs, Steven Hotze, M.D., Al Hartman, Norman Adams, Hon. Rick Green, and Cathie Adams and file their Original Petition, Applications for Emergency Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and for cause would show as follows:

**BACKGROUND FACTS**

History typically measures the way our nation and state respond to adversity by our resolve in our commitment to the liberties enshrined in our constitution. The strength of these liberties is determined not by our resolve in times of ease, but in times of stress. Plaintiffs acknowledge that this is a time of stress.

On March 13, 2020 Governor Abbott declared a state of disaster in response to a strain of novel coronavirus, COVID-19. Federal, state, and local government orders and advisories closed businesses and other activities. Local officials, issued numerous Orders. These Orders attacked rights protected by the Texas Constitution. On July 2, 2020, Governor Abbott issued Executive Order GA-29. GA-29 states that “Every person in Texas shall wear a face covering over the nose and mouth when inside a commercial entity or other building or space open to the public, or when in an outdoor space, wherever it is not feasible to maintain six feet of social distancing from another person who is not in the same household. . . .” (Exhibit A).

This draconian order is contrary to the Texas spirit and invades the liberties the people of Texas protected in the constitution. If the courts allow this invasion of liberty, today’s circumstances will set a precedent for the future, forever weakening the protections Texans sacrificed to protect.

Viruses mutate, so there may be a different coronavirus strain, or some other contagion, next year. Like the flu vaccine, this year’s coronavirus vaccine may not protect against next year’s strain. Will we allow GA-29 to set precedent for future governmental remedies to viruses or diseases? Will it be a little easier to force people to wear certain items or not act in government-disapproved activities on pain of criminal sanctions? Today a mask, tomorrow a hazmat suit – where does it stop? Everyday GA-29 is in effect, the government tramples of the liberties of Texans.

The science behind wearing facemasks to prevent the spread of COVID-19 is uncertain. For instance, the CDC originally questioned the use of face masks during the COVID-19 pandemic. It has since reversed its earlier position. In a CBS’ “60 Minutes” interview on March

8, 2020, Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, stated: “There’s no reason to be walking around with a mask.”

In response to COVID-19, medical practices have been adopted that have little or no scientific support with respect to their efficacy at reducing the spread of this infection (Exhibit “B”). One of these measures is the wearing of facial masks, either a surgical-type mask, facial coverings, or N95 respirator mask. When this pandemic began and we knew little about the virus itself or its epidemiologic behavior, it was assumed that it would behave, in terms of spread among communities, like other respiratory viruses. Little has presented itself after intense study of the virus and its behavior to change this perception.

Adding to the problem is the fact that medical literature suggests wearing facemasks can be harmful. Medical literature has documented that individuals who wear facemasks for long periods of time may suffer from headaches, hypoxia, (low blood oxygen levels) and/or hypercapnia (high blood CO<sub>2</sub> levels) as the cause. It is known that the N95 mask, if worn for hours, can reduce blood oxygenation as much as 20% which can lead to a loss of consciousness. This, of course, could lead to injury and death. Further, wearing a facemask has the potential to cause worse outcomes for individuals infected with COVID-19 because as the mask prevents the body from expelling virus particles, a sick individual will continue to breathe the particles back in causing them to concentrate in the nasal passages, enter the olfactory nerves, and travel into the brain. Health officials continue to vacillate on the efficacy and necessity of facial coverings.

According to the Texas Department of State Health Services (TXDSHS), as of June 29, 2020, the infection rate of COVID-19 in Texas is only 0.5%, which is 1 in 200. Divide the number of reported infections, 148,723, by 30 million population. The result is 0.005. In percentage terms, this is 0.5% of Texans who are presumed or confirmed to have had a COVID-19 infection. That

means that 99.5% of Texans have not been diagnosed to have had COVID-19. According to the TXDSHS data, 2,393 deaths of Texans have been attributed to COVID-19. Divide the number of reported deaths, 2,393, by 30 million population. The result is 0.00008, which is a death rate of .008%. This means that over 99.99% of Texans have survived COVID-19.

Put these 2,393 deaths attributed to COVID-19 in perspective. Last year the TXDSHS reported approximately 180,000 deaths in Texas, caused by multiple diseases and accidents. To date, by comparison, the COVID-19 infection has been a trivial cause of disease and death in Texas.

While the death total is uncertain and the science behind wearing facemasks is uncertain, the deprivation of liberty and violation of the Texas Constitution is certain. Specifically, GA-29 exceeds the statutory authority against which it was issued, violates the separation of powers doctrine, and abridges the right to due course of law. As such, it should be declared unconstitutional and ordered vacated.

#### **DISCOVERY CONTROL PLAN**

Plaintiffs intend to conduct discovery under Level 2 of the rules set forth in Rule 190 of the Texas Rules of Civil Procedure.

#### **DISCLOSURES**

Plaintiffs request Defendant provide disclosures in accordance with Texas Rule of Civil Procedure 194, including relevant documents.

#### **TRCP 47 STATEMENT**

Plaintiffs are suing for injunctive relief and declaratory relief.

Plaintiffs are seeking monetary relief of less than \$100,000.00.

#### **JURISDICTION AND VENUE**

The Court has subject-matter jurisdiction under the Texas Constitution, Article V, § 8, as the amount in controversy exceeds the minimum jurisdictional limits of the court of exclusive interest. Plaintiffs seek relief that can be granted by courts of law or equity.

The Court has jurisdiction over the Plaintiffs' request for declaratory relief against Defendants because the Declaratory Judgment Act waives governmental immunity when the plaintiff is challenging the validity of an ordinance, order, or government action. *See* Tex. Civ. Prac. & Rem. Code §§ 37.004, 37.006; *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628 (2010); *Texas Ed. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

The Court has jurisdiction over the Plaintiffs' request for injunctive relief against Defendants because Defendants are acting *ultra vires* by forcing Plaintiffs to shut down their businesses in violation of Texas law and the Texas Constitution. *See Cty of El Paso v. Heinrich*, 284 S.W.3d 366-368-69 (Tex. 2009).

Plaintiffs have standing to seek declaratory and injunctive relief because they have been affected by the Defendants' conduct.

The Court has personal jurisdiction over the Defendants.

Venue is proper in Travis County because Defendants have their principal office in Travis County, Texas. *See* Tex. Civ. Prac. & Rem. Code § 15.002(a)(3).

Plaintiffs have provided the Texas Attorney General with notice of this suit as required by Texas Civil Practice & Remedies Code §30.004(b).

## **PARTIES**

Plaintiff Steven Hotze, M.D. is the owner of Hotze Health & Wellness Center located at 20214 Braidwood Drive, Katy, Harris County, Texas. Dr. Hotze resides in Harris County, Texas.

Plaintiff Al Hartman is the owner of Hartman Income REIT located at 2909 Hillcroft, Suite 420, Houston, Harris County, Texas. Mr. Hartman resides in Harris County, Texas.

Plaintiff Norman Adams is the owner of Adams Insurance located at 427 W. 20<sup>th</sup> Street, Suite 500, Houston, Harris County, Texas. Mr. Adams resides in Harris County, Texas.

Plaintiff Hon. Rick Green is a former member of the Texas House of Representatives and a resident of Hays County, Texas.

Plaintiff Cathie Adams is the former Chairperson, Republican Party of Texas and a resident of Collin County, Texas. She resides at 375 Adriatic Parkway, #1303, McKinney, Texas 75702.

Defendant Greg Abbott is the Governor of the State of Texas and is sued in his official capacity only. He may be served at 1100 San Jacinto Blvd., Austin, Texas 78701.

### **STATEMENT OF THE CLAIM**

The facts below are supported or proved by the attached Exhibits, which are incorporated herein for all purposes.

### **THE DECLARATION**

#### **1. GA-29 Violates Article I, Section 28 of the Texas Constitution**

“The Constitution is not suspended when the government declares a state of disaster.” *In re Abbott*, No. 20-0291, 2020 WL 1943226, at \*1 (Tex. Apr. 23, 2020). “All government power in this country, no matter how well-intentioned, derives only from the state and federal constitutions.” *In re Salon A La Mode et al.*, No. 20-0340 (concurring opinion, J Blacklock) (Tex. May 5, 2020). During a pandemic “the judiciary, the other branches of government, and our fellow citizens—must insist that every action our governments take complies with the Constitution, especially now. If we tolerate unconstitutional government orders during an

emergency, whether out of expediency or fear, we abandon the Constitution at the moment we need it most.” *Id.*

Any government that has made the grave decision to suspend the liberties of a free people must demonstrate that its chosen measures are absolutely necessary to combat a threat of overwhelming severity. *Id.* Before suspending freedoms protected from infringement by the Constitution, the government is also required to demonstrate that less restrictive measures cannot adequately address the threat. *Id.* Whether it is strict scrutiny or some other rigorous form of review, courts must identify and apply a legal standard by which to judge the constitutional validity of the government’s anti-virus actions.

Justice Blacklock further stated: “[W]hen constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government. When properly called upon, the judicial branch must not shrink from its duty to require the government’s anti-virus orders to comply with the Constitution and the law, no matter the circumstances.” *Id.*

Government power cannot be exercised in conflict with the constitution, even in a pandemic. *In re Abbott*, 2020 WL 1943226 at \*1 (Tex. Apr. 23, 2020). Texas law does not and cannot empower a County Judge to suspend the laws of the State of Texas. The Texas Supreme Court has long held that the Legislature cannot delegate “to anyone else the authority to suspend a statute law of the state.” *Brown Cracker & Candy Co. v. City of Dallas*, 104 Tex. 290, 294-95 (1911); *Arroyo v. State*, 69 S.W. 503, 504 (Tex. Crim. App. 1902) (“Under the constitution, the legislature ha[s] no right to delegate its authority . . . to set aside, vacate, suspend, or repeal the general laws of this state.”).

“[P]rior to 1874 this section was as follows: ‘No power of suspending laws in this state shall be exercised, except by the legislature, **or its authority**’” (emphasis added). *Arroyo*, 69 S.W. at 504. This constitutional provision was then specifically amended to remove the provision allowing

the Legislature to delegate its suspension power by “its authority.” *Id.* This was expressly done to remedy “the history of the oppressions which grew out of the suspension of laws by reason of such delegation of legislative authority and the declaration of martial law.” *Id.*

Article I, § 28 was created in part in response to then-Governor F.J. Davis “declar[ing] . . . counties under martial law” and depriving of liberty “offenders by court martial in Houston,” George D. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 84 (1977). Texas Government Code §418 is therefore unconstitutional on its face because it purports to delegate legislative power to suspend laws to the Governor in contravention of Texas Constitution, Art. I, §28 and Art. II, §1.

As the subject Order endeavors to suspend several provisions of the Texas Constitution, and on its face admit that Defendant is suspending laws in accordance with Texas Gov’t Code Chapter 418, the Order itself is an unconstitutional suspension of the laws and, therefore, violate Article I, §28 of the Texas Constitution and are “null and void.” See *Arroyo*, 69 S.W. at 504. Additionally, to the extent the Texas Disaster Act allows for the suspension of laws by the Governor, it is unconstitutional and void.

The Texas Constitution limits Defendant’s authority even in times of crisis or “extraordinary occasions.” If not limited, and if Constitutional rights may be suspended or infringed, unilaterally and for unlimited duration, whenever a county judge “declares” an emergency, then such rights are wholly illusory. GA-29 violates the Texas Constitution and therefore should be declared void.

## **2. Defendants Usurp the Legislature’s Authority to Define Crimes and Designate Punishment**

Article I, § 28 of the Texas Constitution provides that “The legislature has the exclusive authority to define crimes and to designate the punishments for those crimes.” *Neil v. State*, No.



12-16-00236-R, 2017 Tex. App. LEXI 8862, at \*3 (Tex. App. – Tyler Sep. 20, 2017) (citing *Grant v. State*, 505 S.W.2d 279, 282 (Tex. Crim. App. 1974)). Governor Abbott’s Order makes it a punishable offense for a Texan to visit certain places without wearing a facemask. If Plaintiffs violate Governor Abbott’s Order, they will be given a verbal warning and then fined \$250 for each offense. Accordingly, the order is void in that it violates the separation of powers provision of the Texas Constitution by usurping the authority vested in the Texas Legislature.

### **3. GA-29 Violates Texas Government Code, Chapter 418**

Texas Government Code § 418 et seq., the Texas Disaster Act, does not allow Governor Abbott to force Texans to wear a mask. Specifically, the Disaster Act limits Governor Abbott’s power to those provisions expressly described in the statute. The Disaster Act does not contain any language forcing individuals to wear facemasks.

### **4. GA-29 Violates Article I, § 19 of the Texas Constitution**

GA-29 violates the due course of law provision of the Texas Constitution because it deprives Plaintiffs of their constitutionally protected rights without due course of law. Article I, § 19, entitled, “Deprivation of life, liberty, etc.; due course of law,” states:

“No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.”

Tex. Const. art. 1, § 19. Governor Abbott’s actions violate Plaintiffs due process rights if Plaintiffs (1) have a liberty or property interest entitled to procedural due process protection; and (2) if so, the courts must determine which process is due. *Mosley v. Tex. Health & Human Servs. Comm’n*, 593 S.W.3d 250, 264 (Tex. 2019). Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* Freedom from

confinement is a liberty interest entitled to due process protection. Texans have a liberty interest in their ability to move freely. This interest is entitled to due process protection.

GA-29 is an official action that deprives Plaintiffs of their right to move freely. GA-29 has deprived Texans of the right to be free of confinement without providing Plaintiffs a meaningful opportunity to be heard. Defendants violated Article I, § 19 of the Texas Constitution. Accordingly, GA-29 is void because it violates the Texas Constitution.

**5. Texas Government Code, Chapter 418, Violates the Texas Constitution**

Texas Government Code Chapter 418 is unconstitutional on its face and as applied. Texas Government Code Chapter 418 is unconstitutional on its face because it is an improper delegation of legislative authority expressly prohibited by Texas Constitution, Art. II, §1. GA-29 is facially unconstitutional because Defendant issued GA-29 pursuant to Chapter 418 (an unconstitutional statute) and because they purport to exercise the power to suspend laws which authority is reserved exclusively to the legislature. Tex. Const. art. I, §28. As such, Texas Government Code Chapter 418, and all orders issued pursuant thereto, should be declared unconstitutional and rendered null and void.

**6. GA-29 Violates the Separation of Powers Doctrine**

Defendant's conduct violates the separation of powers provision of the Texas Constitution because it suspends laws. Article II, §1 of the Texas Constitution provides that "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

Tex. Const. art. 2, §1. The Texas Constitution vests the Legislature with “legislative power, *i.e.*, the law-making power of the people.” Tex. Const. art. 3, § 1.

Only the Legislature can exercise law-making power, subject to restrictions imposed by the constitution. Tex. Const. art. II, § 1. Because of the Texas Constitution’s “explicit prohibition against one government branch exercising a power attached to another,” *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001), exceptions to the constitutionally-mandated separation of powers may “never be implied in the least; they must be ‘expressly permitted’ by the Constitution itself.” *Fin. Comm’n of Texas v. Norwood*, 418 S.W.3d 566, 570 (Tex. 2013). These restrictions must be expressed or clearly implied. *Jones v. State*, 803 S.W.2d 712, 716 (Tex. Crim. App. 1991) (citing *Gov’t Servs. Ins. Underwriters v. Jones*, 368 S.W.2d 560, 563 (Tex. 1963)). The Legislature may enact laws that enhance the general welfare of the state and resolve political questions, such as the boundaries of political subdivisions, subject to constitutional limits. *Carter v. Hamlin Hosp. Dist.*, 538 S.W.2d 671, 673 (Tex. Civ. App.-Eastland 1976); see *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).

The Legislature may delegate some of its powers to another branch, but only if those powers are not more properly attached to the legislature by Constitutional mandate. For example, Legislative power cannot be delegated to the executive branch, either directly or to an executive agency. *State v. Rhine*, 297 S.W.3d 301, 306 (Tex. Crim. App. 2009). The issue becomes a question of the point at which delegation becomes unconstitutional. *Id.* The Texas Supreme Court has described the problem: “the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.” *Tex. Boll Weevil Eradication Found., Inc.*, 952 S.W.2d 454, 466 (Tex. 1997).

The Texas Court of Criminal Appeals in *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978), stated that sufficient standards are necessary to keep the degree of delegated discretion below the level of legislating. The existence of an area for exercise of discretion by the executive branch requires that standards are formulated for guidance and there is limited discretion. *Ex parte Granviel*, 561 S.W.2d at 514. The statute must be sufficiently complete to accomplish the regulation of the particular matters falling within the legislature's jurisdiction, the matters of detail that are reasonably necessary for the ultimate application, operation and enforcement of the law may be expressly delegated to the authority charged with the administration of the statute. *Ex parte Granviel*, 561 S.W.2d at 514. Therefore, if the Legislature has not provided sufficient standards to guide the executive's discretion and the delegated power is legislative, that executive has been granted a power that is more properly attached to the legislature and the delegation is an unconstitutional violation of separation of powers. *State v. Rhine*, 297 S.W.3d 306 (Tex. Crim. App. 2019).

Texas Government Code Chapter 418 not only does not provide robust, specific standards related to delegation of legislative authority, it provides **NO** standards to guide Defendant's discretion when identifying penalties, including fines and incarceration. GA-29 imposes a fine of \$250, without any direction from the legislature as to when and how that may be accomplished.

### **CAUSES OF ACTION**

The Plaintiffs brings their claims for relief under the Uniform Declaratory Judgment Act. They also bring suit under *City of El Paso v. Heinrich*, 284 S.W.3d, 366, 368-369 (Tex. 2009), which authorizes *ultra vires* claims against public officials who act in violation of state law.

Plaintiffs are seeking relief entirely under state law and are not asserting any claims that arise under federal law.

### **APPLICATION FOR TEMPORARY RESTRAINING ORDER**

Plaintiffs reallege and incorporate the foregoing paragraphs and incorporate them here as if fully set forth herein.

Plaintiffs seek a temporary restraining order preventing the effect of GA-29 from taking effect. A temporary restraining order serves to provide emergency relief and preserve the status quo until a hearing may be had on a temporary injunction. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). To obtain injunctive relief, “the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *See Butnaru*, 84 S.W.3d at 204. An applicant must plead a cause of action and present some evidence that tends to sustain it to show a probable right of recovery. *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 897 (Tex.App.—Houston [1st Dist.] 2011, no pet.). “[T]he applicant is not required to establish that it will prevail on final trial.” *Texas Kidney, Inc. v. ASD Specialty Healthcare*, No. 14-13-01106-CV, 2014 WL 3002425, at \*2 (Tex. App.—Houston [14th Dist.] July 1, 2014, no pet.).

The Uniform Declaratory Judgment Act and *Heinrich* each provide Plaintiffs with a cause of action to seek declaration and injunctive relief against the Defendants. Plaintiffs have a probable right to relief because, for the reason described above, the Defendants’ conduct shut down the Plaintiffs’ businesses and violates the Texas Constitution. Plaintiffs will suffer probable, imminent, and irreparable injury absent a temporary restraining order and temporary injunction because the Defendants are trampling on Plaintiffs’ rights under the Texas

Constitution and are exceeding Defendants' authority under the Texas Government code § 410 et seq. The deprivation of liberty is an irreparable injury.

Without immediate relief, Plaintiffs will suffer imminent and irreparable harm. With each day that passes Plaintiffs are deprived of liberty and exposed to harm from wearing a facemask.

The harm to Plaintiffs described herein is a direct and proximate result of the acts of Defendant. The requested temporary restraining order is appropriate to preserve the status quo until a hearing on Plaintiff's application for temporary injunctive relief can be held. For just cause, Plaintiffs request the entry of a Temporary Restraining Order as follows, and further requests entry of a Preliminary Injunction following a hearing:

Plaintiff will provide Defendants' counsel with notice of this Application for Temporary Restraining Order and hearing on same.

Plaintiff files this Verified Application for Temporary Restraining Order and Other Equitable Relief pursuant to general principles of equity, Texas Rules of Civil Procedure 680, *et seq.*, and Texas Civil Practice and Remedies Code section 65.011. Plaintiff is willing to post a bond as required by Texas law in an amount determined by the Court.

#### **GROUND FOR TEMPORARY INJUNCTION**

Plaintiffs reallege the foregoing paragraphs and incorporates them here as if fully set forth herein.

Plaintiffs request this Court to set is Request for Temporary Injunction for hearing and after hearing issue a temporary injunction against Defendant.

Additionally, Plaintiffs further request that following a trial on the merits of this case, that the Court enter a permanent injunction against Defendant.

## DEMAND FOR JUDGMENT

Plaintiffs demand the following relief:

- a. a declaration that GA-29 violates Article I § 19 of the Texas Constitution and is invalid;
- b. a declaration that to the extent Texas Government Code Chapter 418 allows Defendant to suspend laws, issue penalties, and violates the separation of powers doctrine, that Chapter 418 of Texas law is unconstitutional;
- c. a temporary and permanent injunction that prevents Defendant Order;
- d. a temporary restraining order that suspends the enforcement of GA-29;
- e. an award of nominal and compensatory damages;
- f. an award of costs and attorneys' fees; and
- g. all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted,

/s/ Jared R. Woodfill

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